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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GORDON PAUL COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supremacy Clause of the United States Constitution, Article VI, Clause 2, requires that federal trial and appellate courts recognize the federal legislation codified as 40 CFR 503, taking effect on February 19, 1993, as to compliance by this petitioner, regulating and providing for the direct application of sewage sludge to land, and whether, therefore, a United States citizen fully complying with 40 CFR 503 can be convicted of an alleged violation of 33 U.S.C. 1319(c)(2)(A) and 1342, aiding and abetting the unlawful disposal of sewage sludge, an important question of federal law that has not been, but should be, settled by this Court?

2. Whether Federal Rule of Criminal Procedure 52 can be invoked by a United States Court of Appeal to prevent resolution of the issue of unlawful conviction of a federal defendant by the knowing use of key, material perjury by the Office of the United States Attorney, in violation of *Mooney v. Holohan*, 294 U.S. 103 thru *Alcorta v. Texas*, 355 U.S. 28 thru *Napue v. Illinois*, 360 U.S. 264, 269 thru *Miller v. Pate*, 386 U.S. 1 thru *Giglio v. United States*, 405 U.S. 150 thru *United States v. Agurs*, 427 U.S. 97, 103 n.8, the United States Court of Appeals for the Ninth Circuit deciding an important federal question that conflicts with relevant decisions of this Court?

QUESTIONS PRESENTED – Continued

3. Whether the rule and command of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) is violated by an Assistant United States Attorney willfully suppressing a key material FBI 302 investigative report that proves government witness perjury at a federal trial, the United States Court of Appeals deciding this important federal question in a way that conflicts with relevant decisions of this Court?

4. Whether the willful suppression of an immunity agreement deal made to a key, material, critical government witness requires reversal of a federal conviction obtained, in large, from the testimony of that witness, who was otherwise committing perjury known to the United States Attorney, that witness denying any deal had been made, and the Assistant United States Attorney failing to correct the denial and/or voluntarily admit the existence of the deal, the United States Court of Appeals for the Ninth Circuit deciding an important federal question in a way that conflicts with relevant decisions of this Court, or, alternately an important question of federal law that has not been, but should be, settled by this Court?

5. Whether the attempt to collect for services lawfully rendered in compliance with 40 CFR 503, disposal of sewage sludge by direct application to land, constitutes an intent to defraud, and thus to allow an elevation of 10 points in United States Sentencing Guidelines 2 F 1.1(b)(1)(K), for a federal defendant, an important question of federal law that has not been, but should be, settled by this Court?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Gordon Paul Cooper, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the ruling/opinion entered April 9, 1999, rehearing/suggestion for hearing En Banc denied May 28, 1999.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered its published opinion, *United States v. Gordon Paul Cooper*, 173 F.3d 1192 (9th Cir. 1999), on April 9, 1999. A timely petition for rehearing/suggestion for hearing En Banc was denied on May 28, 1999. Copies of these opinions and orders appear in the Appendix.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals affirmed the conviction by a published opinion, 173 F.3d 1192 (9th Cir. 1999) entered April 9, 1999. A copy of that opinion appears at Appendix A-1.

(ii) The United States Court of Appeals entered an order denying rehearing/suggestion for hearing En Banc on May 28, 1999. A copy of that order appears at Appendix B-1.

(iii) Jurisdiction to review by certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

SUPREMACY CLAUSE, ARTICLE VI, CLAUSE 2:

This Constitution, *and the laws of the United States which shall be made in pursuance thereof;* and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land;* and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

FIFTH AMENDMENT, U.S. CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to the twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

FEDERAL RULE OF CRIMINAL PROCEDURE 52:

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

CODE OF FEDERAL REGULATIONS 40 CFR 503
(SEE APPENDIX C)

STATEMENT OF THE CASE

A. The Supremacy Clause, U.S. Constitution, Article VI.

Petitioner Gordon Paul Cooper was an officer in Chino Corona Farms (CCF), a southern California corporation that physically hauled sewage sludge from various city sewage processing plants for disposal under regulated conditions.

One of CCF's clients was the City of San Diego, California, who processed its sewage under a National Pollutant Discharge Elimination System (NPDES) permit issued by the State of California Regional Water Quality Board.

The sewage sludge hauling for the City of San Diego was administered via a 1990 written contract between the City of San Diego and CCF. (See Appendix E for that contract.) That contract did not reference or incorporate the NPDES permit. The contract specifically provided that all of San Diego's sludge was "nonhazardous."

The contract provided that CCF transport the nonhazardous sewage sludge to land in Thermal, California, where it was to be "composted," i.e., periodically turned over in "windrows" to cause aeration, and then later sold and applied to farmland as a fertilizer. The transport to the Thermal land occurred for a couple years, and the huge amount of sewage sludge eventually exceeded ability to "compost" each new day's arrival. Fortunately, petitioner and CCF were able to obtain an agreement with the Republic of Mexico to directly transport some of

the nonhazardous sewage sludge there for direct application to Mexican farmland as a fertilizer, and in Spring, 1992, such an arrangement was commenced, with permission and knowledge of the City of San Diego and the State Regional Water Board.

CCF hired a Mexican citizen, Manuel Mier, to secure drivers and trucks to accomplish the daily trek from the City of San Diego's processing plant at "Fiesta Island" directly to Mexico, with border crossing from Calexico, California to Mexicali, B.C., Mexico, and thence inland to the receiving farms.

This arrangement existed until February, 1993, when the United States Congress passed National legislation governing "Standards For The Use Or Disposal Of Sewage Sludge," including provisions for the legal and lawful and scientifically sound Direct Application of Sewage Sludge to Land. While the entire 40 CFR 503 is lengthy, relevant key excerpts from this federal legislation are set forth in Appendix C to this petition.

Importantly, if the sewage sludge met, and was within, i.e., below, certain ceiling concentrations of matters deemed to be "pollutants" set forth in 40 CFR 503.13, the City of San Diego's nonhazardous sewage sludge could be directly applied to farmland without any perceived intermediate process such as "composting" it. This legislation, enacted February 19, 1993, specifically provided in 40 CFR 503.2(a) that "compliance with the standards in this part shall be achieved as expeditiously as practicable, but in no case later than February 19, 1994."

Petitioner Cooper, and CCF, with extensive experience in sewage sludge hauling, were aware of this impending legislation, and could and did immediately comply with it since all of the nonhazardous sewage sludge

treated at the City of San Diego's "Fiesta Island" processing plant met the federal scientific requirements, i.e., all of the recognized "pollutants" enumerated in 40 CFR 503.13 were below the allowed levels, and thus the sewage in question could be, and was, legally and lawfully directly applied to farmland of a farmer, one Jay Mason, in Imperial County, California, after February 19, 1993. Several sections of the 40 CFR 503 federal legislation which governed the allowance of direct application of nonhazardous sewage sludge to land are of key relevance: 503.13(b) provided, under its Direct Enforcibility clause, that "No person shall use or dispose of sewage sludge through any practice for which requirements are established in this part *except in accordance with such requirements.*" 503.4, dealing with "Relationship to other regulations", provided that disposal of sewage sludge via recognized techniques previous to this enacted legislation that now meet the requirements of 40 CFR 503 constituted full compliance with the *Clean Water Act,* and under 503.5, while the "permitting authority may impose requirements for the use or disposal of sewage sludge" in addition to or more stringent than the requirements, that must be shown to "be necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge."

CCF fully analyzed the City of San Diego sewage sludge prior to its direct application to California farmland on or after February 19, 1993, and it fully complied with 40 CFR 503.13, as well as the "vector" and "pathogen" mandates of 503.15, 503.32(a) and 503.33(b)(1) thru (b)(8). All sewage sludge applied directly to the farmland of farmer Jay Mason in Imperial County, California, was

legally and lawfully applied pursuant to the federal scientific and chemical standards of 40 CFR 503, and the U.S. Court of Appeals, at A-5 and A-10-11, found that "expert testimony" presented at trial established that the Fiesta Island sewage sludge met federal standards for direct land application. There were, therefore, no other government standards necessary to "protect public health and the environment." Surely none were introduced by the government at trial.

A final key area is contained in 40 CFR 503.10:

> (a) This subpart applies to any person who prepares sewage sludge that is applied to the land, to any person who applies sewage sludge to the land, to sewage sludge applied to the land, and to the land on which sewage sludge is applied, and
>
> (b) *Bulk Sewage Sludge.* The general requirements in 503.12 and the management practices in 503.14 do not apply when bulk sewage sludge is applied to the land if the bulk sewage meets the pollutant concentrations in 503.13(b)(3), the Class A Pathogen requirements in 503.32(a), and one of the vector attraction reduction requirements in 503.33(b)(1) through (b)(8).

Since the City of San Diego nonhazardous sewage sludge fully met all federal requirements in 40 CFR 503 to directly apply it to land, the *General Requirements* in 503.12, and specifically its *notice requirements* at 40 CFR 503.12(j), *did not have to be met*:

> Any person who applies bulk sewage sludge subject to the cumulative pollutant loading rates in 503.13(b)(2) on the land shall provide written notice, prior to the initial application of bulk sewage sludge to a land application site by the applier, to the permitting authority for the State in which the bulk sewage sludge will be applied and the permitting

> authority shall retain and provide access to the notice.
>
> The notice shall include: (1) the location, by either street address or latitude and longitude, of the land application site. (2) The name, address, telephone number, and National Pollutant Discharge Elimination System permit number (if appropriate) of the person who will apply the sewage sludge."

Petitioner Cooper was convicted of violating the NPDES permit by failing to advise the City of the direct deposit of sludge to the land.

Thus petitioner and CCF need not have first notified the California State Regional Water Board, nor the City of San Diego, prior to fully complying with the new federal laws contained in 40 CFR 503 when the nonhazardous, benign City of San Diego sewage sludge was applied to the farmland of Imperial County.

At issue in this Petition for Certiorari is whether the nationally and subsequently enacted governing legislation at 40 CFR 503, enacted and becoming effective on February 19, 1993, became the supreme law of the land pursuant to Article VI, clause 2, of the United States Constitution, and whether, therefore, petitioner Cooper could be convicted of "unlawful disposal of sewage sludge" pursuant to 33 U.S.C. 1319(c)(2)(A) and 1342, and "conspiracy" to do so under 18 U.S.C. 371 when he had fully complied with the supreme law of the land, and, as here, this sludge was nonhazardous.

The U.S. Ninth Circuit tersely held that the nationally governing legislation 40 CFR 503 in no way superseded the so called NPDES permit, the latter of which was never incorporated in, or mentioned, or made a part of petitioner's contact to simply transport and dispose of the

sewage sludge generated by the City of San Diego. See A-12-A-16 inclusive, Appendix A, opinion, U.S. Ninth Circuit (173 F.3d 1192, ___ (9th Cir. 1991)).

B. The mail fraud conviction, 18 U.S.C. 1341.

Petitioner and CCF obtained payment for the transport of sewage sludge by tonnage removal and disposal. Of necessity, therefore, each truckload was weighed, both at the Fiesta Island processing plant by the City of San Diego officers (skip-load weighing as the truck was filled), and later at a commercial scale. These scale receipts were mailed to the City of San Diego to obtain payment. It is of significant interest that the City's own weighing processes at its Fiesta Island processing plant closely verified the amounts billed to the City by CCF.

Matters went well until Mexican citizen Manuel Mier was hired at $500/week to arrange for and supervise the transportation of the sludge into the Republic of Mexico during a period from Spring, 1992, through February 19, 1993, this latter date being the commencement of allowing the direct application of the nonhazardous sewage sludge to land under the newly enacted, nationally governing federal legislation at 40 CFR 503.

Mier was to be paid $5.00 per truckload to pay for the commercial weighing of each truck. The petitioner and CCF physically made these payments, believing that Mier was honestly causing each truck to be weighed. Instead, Mier privately arranged to have a print shop make up false and phony weigh slips without petitioner Cooper being aware of his fraud, and he thus was able to fill out a false weight slip for each load and pocket the $5.00.

When the City learned of the deposit of the nonhazardous sludge at the farm of Jay Mason, although that

deposit fully complied with the nationally governing 40 CFR 503 mandates, they refused to pay for some $566,000 in fees due to CCF, and the weight slips falsely printed by Mier and personally filled out by him and later mailed to the City by CCF were examined, disclosing that they were sequentially numbered, a result incongruent with the normal commercial scale weigh master certificates, since other vehicles would, logically, be weighed in between the trucks of CCF, thus destroying the numerical tandem sequence.

Manuel Mier, apparently threatened with prosecution by the FBI and the office of United States Attorney, Southern District of California, became the key witness for the government at petitioner's trial, as to the 18 U.S.C. 1341 charges.

Mier, in a formal interview report to the FBI in March, 1996, stated that he, Mier, did not know where the "weigh slips" came from, but he, Mier, had personally witnessed petitioner Cooper enter a then non-named Mexicali print ship, Mier not entering, and a couple days later, petitioner Cooper gave him a box of completed false weigh slips. However, on April 4, 1996, AUSA Melanie Pierson placed Mier before the U.S. Grand Jury, seeking petitioner's indictment, and permitted Mier to testify that *Mier and Cooper* went into a then non-named print shop in Mexicali, B.C., and they jointly ordered the phony "weigh slips," Mier translating English-Spanish for petitioner Cooper, who is not bilingual. Having access to the March, 1996, FBI report stating a rather different scenario, AUSA Pierson made no effort to correct the Mier testimony, vis-a-vis the March, 1996, FBI report, one version of which must be perjury. If the March 1996, report was perjured, Mier is guilty of an 18 U.S.C. 1001 violation. If the Grand

Jury testimony was perjured, 18 U.S.C. 1623 was violated. Apparently, following Mier's cooperation with AUSA Pierson before the grand jury, she derived from him that the Mexicali print shop claimed to be the situs of printing was called "Impremex," located at 2088 Maderos, Mexicali, B.C. Mexico, and the FBI visited it on April 25, 1996, learning from officials thereat *that no such printing had been done there.* This report was suppressed from the defense by AUSA Pierson, and was never disclosed until after the trial was concluded. At trial, having in mind the suppressed FBI report showing false the story of Mier regarding the genesis of the "weigh slips," AUSA Melanie Pierson permitted Mier to tell a yet different under oath tale of weigh slip origin: that he, Mier, petitioner Cooper, and one "Barilla," or "Padilla," had jointly gone to the now-named Impremex print shop and had arranged for the printing of the weigh slips. At this time AUSA Pierson, representing the United States at trial, still suppressed the April 25, 1996, FBI report showing that the printing had not been done at "Impremex."

No matter which of these 3 false stories the jury might have accepted, all of them asserted that petitioner Cooper was either personally, or jointly, involved in the false printing, but the government attorney willfully suppressed from the jury that the FBI had learned that it had never occurred at all where Mier claimed it to have been done. See FBI 302 reports, April 25, 1996 and October 19, 1996, Appendix D.

The United States Court of Appeals at A-16-A-20 asserts that it can not deal with this blatant governmental perjury since petitioner and his lawyer failed to assert perjury at trial, and thus the "plain error" doctrine of F.R.

Criminal Procedure 52 precluded dealing with the commanding law of *United States v. Agurs*, 427, U.S. 97, 103, and footnote 8.

At issue is whether governmental suppressed evidence proving perjury, that evidence of perjury being first and only discovered after trial, allows the rule of "plain error" to be invoked, or whether the long line of cases uniformly condemning government perjury stemming from *Mooney v. Holohan*, 294 U.S. 103 through *United States v. Agurs*, 427 U.S. 97, 103, n.8 require the grant of Certiorari to elucidate this Ninth Circuit misconception. Plain error applied here as to prosecution perjury discovered after trial appears to be a case of first impression.

C. The failure to reveal the "deal" or immunity agreement, formal or informal, accorded to key government witness Manuel Mier.

At A-19-A-20, C. *Immunity Agreement*, the U.S. Ninth Circuit somehow forgives the failure of the government to reveal that they had agreed to not indict, arrest, and try Manuel Mier for his series of crimes, including 18 U.S.C. 1001, material false statements to the FBI, 18 U.S.C. 1623, material false testimony before a federal grand jury, and obviously false trial testimony regarding printing of the weigh slips, as well as his admitted personal falsification of weigh slips, never having weighed the trucks at any time after he assumed responsibility for the hauling to Mexico and the February, 1993 hauling to the farm of Jay Mason. At no time has Manuel Mier been arrested, charged, indicted, or tried for these many crimes. It is clear that the government, either formally or informally, made an immunity agreement with Mier, suppressed it from the defense at trial, and refused to either disclose it,

or correct Mier's perjury when he denied any such agreement. This technique, perhaps a new and innovative governmental effort to escape the consequence of *Giglio v. United States*, 405 U.S. 150 (1972) and *DeMarco v. United States*, 415 U.S. 449 (1974), should cause the grant of Certiorari to further elucidate the government's obligations under *Giglio*. This governmental technique creates, apparently, a case of first impression, if not governed by *Giglio and DeMarco*.

D. Sentencing Issues:

Under the U.S.S.G., and cases there interpreting, a federal defendant can be charged with the larger of what he *actually* defrauded someone out of, or what he *intended* to defraud that party out of. See, e.g., *United States v. Shaw*, 3 F.3d 311 (9th Cir. 1993).

At bar, the figure $566,000, the amount CCF billed the City of San Diego for nonhazardous sewage sludge removed after February 19, 1993, and lawfully (40 CFR 503) applied directly to the farmland of Jay Mason in Imperial County, for which the City refused to pay CCF, was deemed an *"intended loss"* for sentence enhancements. Clearly, since the City refused to pay, the City *actually* lost nothing.

This figure, a desire to get reimbursed for a fully legitimate billing for nonhazardous sewage sludge truly removed and lawfully deposited directly on the land pursuant to 40 CFR 503, caused a ten-level sentencing enhancement under U.S.S.G. 2F1.1(b)(1)(K). At A-25-A-28, the U.S. Ninth Circuit, in its circuitry of reasoning, held petitioner fully liable for an *"intended loss"* of

$566,000 to the City where, here, the nonhazardous sewage sludge was lawfully removed and disposed of pursuant to 40 CFR 503, and petitioner and CCF legitimately billed for these services, petitioner being unaware of Manuel Mier's falsifications, and not learning of the perjury until after trial.

Certiorari should be granted to analyze and elucidate the U.S.S.G. in *"actual"* v. *"intended"* losses. See *United States v. Shaw*, 3 F.3d 311 (9th Cir. 1993). This appears to be a case of first impression and should cause the grant of certiorari.

ARGUMENT I

ARTICLE VI, CLAUSE 2, UNITED STATES CONSTITUTION, THE SUPREMACY CLAUSE, REQUIRES THAT RECOGNITION BE GIVEN TO THE SUBSEQUENTLY AND NEWLY ENACTED 40 CFR 503 AND ITS RELEVANT SECTIONS, WHICH ALLOW THE DIRECT APPLICATION OF SEWAGE SLUDGE TO LAND THAT MEETS CERTAIN CHEMICAL MAKEUP, AND REQUIRES REVERSAL OF A CRIMINAL CONVICTION FOR A CHARGE OF UNLAWFUL DISPOSITION OF SEWAGE SLUDGE IN THIS CASE.

The advancement of scientific study and improvements in the disposal of sewage sludge bore fruit in the United States when, effective February 19, 1993, the Congress enacted 40 CFR 503, STANDARDS FOR THE USE OR DISPOSAL OF SEWAGE SLUDGE.

Petitioner attaches relevant sections of that legislation as Appendix C.

Importantly, the legislation provided that in 503.2(a), "compliance with the standards in this part shall be achieved as expeditiously as practicable, but in no case later than February 19, 1994."

Petitioner originally in 1990 operated under a civil contract with the City of San Diego, California, said City operating under an older *National Pollutant Discharge Elimination System* permit (NPDES) to process its sewage. That contract provided that petitioner's company, Chino Corona Farms (CCF), would subject the sewage to *composting* on a reservation near Thermal, California. However, after several months of this operation, the huge amount of sewage sludge being brought each day for composting caused a backlog and in late Spring, 1992, petitioner and CCF had the chance to transport some of the excess sludge directly from the city's sewage processing plant at Fiesta Island, San Diego, to Mexicali, Mexico, without composting it. In Mexicali, the sludge was used as a fertilizer, and the City of San Diego acquiesced in this Mexicali site because they decided that they had no jurisdiction over it, and if the Mexican facility accepted it for use as a fertilizer, no violations of laws of the United States would ensue.

An important provision of the original contract between the City of San Diego and CCF was:

> "Contractor (CCF) hereby agrees to comply with Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment Practices Act, *and any other applicable federal or state laws and regulations hereinafter enacted,* as well as those requirements addressed by the City of San Diego's Equal Opportunity Program, recorded with the City Clerk as Document RR-262633."

That contract did not provide for criminal prosecution if it was breached, but instead went on to require:

> "Contractor (CCF) understands that failure to comply with the above cited laws and regulations and/or falsely submitting information under same laws and regulations may result in

> termination of this contract and debarment from awards of future city contracts for a period of not less than one (1) nor more than two (2) years." (Govt. Trial Exhibit 2)

Returning, then, to the 40 CFR 503 legislation which took effect 2-19-93, but which allowed a compliance period of a year to the potential direct application of the sewage sludge to land, it is important to note that this was *"federal law and regulation"* enacted after the CCF-City of San Diego contract, and after 2-19-93, petitioner applied conforming, nonhazardous sewage sludge directly to farmland in Imperial County, California.

Clearly the sewage sludge met the chemical requirements of Sections 503.10(a), (b)(1), 503.12, 503.13 (b)(3), 503.14, as found by the U.S. Ninth Circuit opinion at A-12:

> "At trial, the district court allowed Cooper to testify that he had relied on the federal regulations, and to present expert testimony that the Fiesta Island sewage sludge met federal standards for direct land application."

Inasmuch as 40 CFR 503.10 (b)(1) provides:

> "The general requirements in 503.12 and the management practices in 503.14 *do not apply when bulk sewage sludge is applied to the land if the bulk sewage sludge meets the pollutant concentrations in 503.13(b)(3), the class A pathogen requirements in 503.32(a) and one of the vector attraction reduction requirements in 503.33 (b)(1) through (b)(8),"*

as found by the U.S. Ninth Circuit supra, the sewage sludge deposited after February 19, 1993, directly to the farmland of Imperial County, California, met all chemical-pathogen-vector requirements, and thus the General Requirements of 503.12 were waived, as were the management practices of 503.14.

The 40 CFR 503 federal legislation was newly enacted, was lawfully complied with by petitioner on and after Feb. 19, 1993, and it became the newly enacted law of the land per the Supremacy Clause of Article VI of the U.S. Constitution, which provides:

> This Constitution, *and the laws of the United States which shall be made in pursuance thereof;* and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land;* and the judges in every state shall be found thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Petitioner thus complied with the newly enacted law of the land in 40 CFR 503 Sections 10, 12, & 14, and thus was not in violation of the new law which now allowed direct application of conforming sewage sludge to farmland as a fertilizer. Importantly the City need not have been notified of the direct application.

Moreover, petitioner's contract with the City of San Diego set forth in Appendix "E," specifically provided that petitioner would comply with "any other applicable federal laws and regulations hereinafter enacted."

Certiorari should be granted to resolve that Article VI, clause 2 of the U.S. Constitution permits, and indeed requires, that the newly enacted, and chemical and scientifically supported, federal law at 40 CFR 503 be accorded full faith and credit as the law of the land. It is questionable whether any thing other than a simple breach of contract, of the CCF-City of San Diego Contract, occurred, if that is even demonstrated, by petitioner's direct deposit of chemically benign sewage sludge to the farmland of Imperial County California, after February 19, 1993.

Petitioner was convicted of an alleged violation of the older NPDES permit by directly applying nonhazardous, fully treated and conforming sewage sludge to farmland *without notifying the City.* However, the subsequent national law under 40 CFR 503 *excuses such notification* and allows said direct application.

Thus no federal law was violated by petitioner, and federal law permitted petitioner's direct application to farmland.

Certiorari should be granted in this first interpretation of 40 CFR 503 and the supremacy clause of the United States Constitution, a key and highly relevant issue in the environmental legislation today.

ARGUMENT II

FEDERAL RULE OF CRIMINAL PROCEDURE 52 DOES NOT APPLY TO U.S. GOVERNMENT ATTORNEY USE OF PERJURY IN FEDERAL TRIALS, WHERE THAT PERJURY IS UNKNOWN TO THE DEFENSE, BUT IS KNOWN, OR SHOULD BE KNOWN, TO THE GOVERNMENT AND ITS COUNSEL; THE U.S. COURT OF APPEALS WRONGLY REFUSED TO APPLY THE COMMANDS OF *UNITED STATES v. AGURS* (1976) 427 U.S. 97, 103, AND CASES CITED THEREIN AT FOOTNOTE 8, ASSERTING THAT THE RULE OF "PLAIN ERROR" FORECLOSED APPELLATE SCRUTINY OF THIS GOVERNMENT PERJURY AND SUPPRESSION OF EVIDENCE BECAUSE PETITIONER COOPER "DID NOT ARGUE AT TRIAL THAT THE GOVERNMENT PRESENTED PERJURED TESTIMONY."

Very fundamental and inconsistent reasoning allowed the U.S. Ninth Circuit to circumvent analysis of clear government witness perjury by its use of rule 52, Federal Rules of Criminal Procedure, i.e.:

FEDERAL RULE OF CRIMINAL PROCEDURE 52:

> (a) *Harmless error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) *Plain error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

In fact, this clear government known perjury must be evaluated by the continuous command of this court in *United States v. Agurs*, 427 U.S. 97, 103:

> The rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, arguably applies in three quite different situations. Each involves the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense.
>
> In the first situation, typified by *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony, and that the prosecution knew, or should have known, of the perjury. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjury is fundamentally unfair,[8] and *must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."*

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[8] *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104; *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 273, 38 L.Ed.2d 216.

The U.S. Ninth Circuit, in tersely dealing with this key, material prejudicial perjury, and failure to correct it, and the suppression of an F.B.I. report that proved it perjured, stated at page A-9:

> **B. Perjured Testimony**
>
> [11] "If a prosecutor knowingly uses perjured testimony or knowingly fails to disclose that testimony is false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict." *Ortiz v. Stewart*, 149 F.3d 923, 936 (9th Cir. 1998). Because Cooper did not argue at trial that the government presented perjured testimony, this court may review only if there was plain error affecting substantial rights. *People of Territory of Guam v. Veloria*, 136 F.3d 648, 652 (9th Cir. 1998). If those conditions are met, the appellate court may exercise its discretion to review an error "only if . . . the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citing *Johnson v. United States*, 520 U.S. 461, 467 (1997)).
>
> [12] Here, even if we assume that Mier committed perjury and the government knew of it, the prejudice to Cooper was not great. Cooper's attorney was able to impeach Mier extensively with inconsistent statements. There was no plain error.

Petitioner reviews these undisputed facts which should show the significance and high materiality to this perjury:

(1) Inter alia, petitioner was charged and convicted of mail fraud occasioned by his company's employees mailing allegedly fraudulent "weigh slips" via the U.S. Mails to the City of San Diego to secure, or attempt to

secure, payment for some $566,000 in fees due his corporation for actually hauling that much benign, nonhazardous sewage sludge away from the City's sewage processing facility and depositing it, in full conformity with the newly enacted 40 CFR 503 laws, directly on farmland in Imperial County.

2. The government contended that petitioner willfully falsified the billing of this sewage sludge in a criminal agreement with the key chief government witness, Manuel Mier, by causing the production and the mailing of "weigh slips" for trucks that never had been weighed.

3. As stated at page A-9, the U.S. Ninth Circuit found:

> When the case went to trial, Mier was one of the key witnesses against Cooper. On cross-examination, the defense established that Mier had told at least three conflicting stories about how and where he had obtained the blank weighmaster certificates used for the Mexicali operation. First, in an FBI report from March 1996, Mier said that Cooper went to a print shop in Mexicali by himself and later gave Mier a box of weighmaster certificates. Second, testifying before the grand jury in April 1996, Mier said that he went into a print shop in Mexicali with Cooper, translated for Cooper, and helped order the weighmaster certificates. Third, at trial, Mier testified that he went to a Mexicali print shop with Cooper and another person (either "Barilla" or "Padilla"), and that the three men arranged for printing the certificates.

4. Irrespective of which one of these versions the jury accepted, the true facts were that the F.B.I. had sent 3 agents to that print shop, and had learned that the printing had not been done at that shop. This F.B.I. 302 report

of April 25, 1996, was suppressed from the defense at trial, and was not discovered until current counsel (appeal/certiorari) made inquiry of government trial counsel, AUSA Melanie Pierson, why the F.B.I. had not gone to that print shop and secured evidence that Mier and petitioner had indeed had the printing of the weigh slips done there. Upon this inquiry, AUSA Pierson initially disclosed the said F.B.I. report of April 25, 1996, well after petitioner's conviction.

It is clear that this report would have established key government witness Manuel Mier a perjurer on any one of the 3 different stories, all of which claimed to establish petitioner as the securer of false weigh slips at that print shop. (See appendix D for the April 25, 1996, F.B.I. 302 report suppressed from the defense, only disclosed after trial, and for a companion 302, dated October 19, 1996, establishing that the FBI had been told by Mier of the identity, known to be false, of the situs of publishing).

While the U.S. Ninth Circuit addressed the "missing document", it, seemingly, was loathe to lay a perjury finding on the heads of the government. It was to otherwise claim that the suppressed FBI report was "not material," and because the defense was able to "impeach Mier extensively," there could be no added benefit to petitioner and his counsel by use of an FBI report which proved Mier a liar, with government knowledge, on any one of the three stories, all of which claimed petitioner had personally arranged for the false weigh slips. The defense was, of course, that Mier had, apparently, without petitioner's knowledge, personally arranged for the printing of the slips, had never caused the trucks to be weighed, had received $5.00 per truck from petitioner, and had pocketed the money. Indeed, petitioner

advanced $5.00 per each truck to be weighed, and fully assumed that the lying government witness was causing them to be weighed, because that was the only way that petitioner could be paid for each ton of sewage sludge removed from the City of San Diego.

The issue of the false weigh slips was, clearly, a trial credibility issue between government perjurer Manuel Mier and petitioner as to the mail counts, and, quite plainly, the government, virtually solely via use of Mier, illegally and unlawfully caused petitioner's conviction. This case travelled, therefore, under the *U.S. v. Agurs-Mooney v. Holohan-Brady v. Maryland* canopy, which requires this conviction to be set aside *"if there is any reasonable likelihood that the false testimony (and suppressed FBI 302 report) could have affected the judgment of the jury."* It is, clearly, not a F.R. Criminal Procedure 52 "plain error" case, and certiorari should be granted to, once again, make plain that government witness perjury will not be tolerated. See, also, *Mesarosh v. United States,* 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1 (1956) for requirements involving this Honorable Court's Supervisory role over the lower federal Courts.

The clearly applicable law, long ago, and consistently, enunciated by this court, can be summarized from *Napue v. Illinois,* 360 U.S. 264, 269 (1959):

> *First,* it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, *Mooney v. Holohan,* 394 U.S. 103; *Pyle v. Kansas,* 317 U.S. 213; *Curran v. Delaware,* 359 F.2d 707. See *New York ex rel. Whitman v. Wilson,* 318 U.S. 688, and *White v. Ragen,* 324 U.S. 760. Compare *Jones v.*

Commonwealth, 97 F.2d 335, 338, with *In re Sawyer's Petition*, 229 F.2d 805, 809. Cf. *Mesarosh v. United States*, 352 U.S. 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Alcorta v. Texas*, 355 U.S 28; *United States ex rel. Thompson v. Dye*, 221 F.2d 763; *United States ex rel. Almeida v. Baldi*, 195 F.2d 815; *United States ex rel. Montgomery v. Ragen*, 86 F.Supp. 382. See generally annotation, 2 L.Ed.2d 1575.

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides*, 1 N.Y.2d 554, 557; 136 N.E.2d 853, 854-855; 154 N.Y.S.2d 885, 887:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a

> trial that could in any real sense be termed fair."

In reality, the issue of the false "weigh slips" was simply a trial credibility issue between petitioner and Manuel Mier, and government perjury and suppression of evidence affecting Mier's credibility must lead to the conclusion that "there is a reasonable, likelihood that the false testimony could have affected the judgment of the jury," a standard that the U.S. Ninth Circuit failed to address due to their erroneous diversion to F.R. Criminal Procedure 52.

Certiorari should be granted to enunciate, on a national basis, whether F.R.CRIM. PROC. 52 applies at all to deny an appellate attack on prosecution witness perjury, that perjury only being discovered, after trial and conviction.

This appears to be a case of first impression in review of federal convictions obtained in part by the knowing use of perjury.

ARGUMENT III

CERTIORARI SHOULD BE GRANTED TO SET NATIONAL FEDERAL STANDARDS THAT MUST GOVERN MANDATORY DISCLOSURE OF "DEALS" BY ASSISTANT U.S. ATTORNEYS PRESENTING KEY, MATERIAL EVIDENCE VIA INDICTABLE FEDERAL CRIMINALS WHO DENY, UNDER OATH, THAT ANY "DEAL" HAD BEEN GIVEN TO THEM IN EXCHANGE FOR THEIR TESTIMONY; SEE *GIGLIO v. UNITED STATES*, 405 U.S. 150; *DEMARCO v. UNITED STATES*, 415 U.S. 449.

The government prosecuted petitioner Cooper on key counts of his trial largely, and solely, via one Manuel Mier, the person hired to supervise the hauling of sewage

sludge from San Diego into the Republic of Mexico in 1992. While petitioner was not prosecuted for illegal transport of sewage sludge into Mexico, for the avowed rationale of no jurisdiction as to any claim of illegal deposit in a foreign country, petitioner was charged with counts of 18 U.S.C. 1341, mail fraud, stemming from his mailing of allegedly fraudulent "weigh slips" to the City of San Diego to obtain payment for transporting of this sewage sludge. As the Ninth Circuit opinion makes clear, Manuel Mier *"faced potential criminal prosecution in the United States"* for his several crimes, including 18 U.S.C. 1001, lying to the FBI as to the circumstances of how the weigh slips were printed; 18 U.S.C. 1623, his lying to the Grand Jury; and his admission, at trial, of falsely filling out literally dozens and dozens of weigh slips without causing the weighing of the trucks in 1992-1993.

The assistant U.S. Attorney in this case, Melanie K. Pierson, had the FBI subpoena Mier from Mexico to San Diego, California, on two separate occasions: (i) for his April 4, 1996, testimony before the grand jury, and (ii) his testimony at petitioner's 1997 trial. On each occasion AUSA Pierson knew of indictable crimes admittedly committed by Manuel Mier, and at both the grand jury and at trial, willfully allowed Mier to commit perjury, knowing that perjury to be occurring. At no time was Mier arrested, charged, indicted, or tried for his admitted crime of falsifying weigh slips, nor for his known crimes of 18 U.S.C. 1001, lying to the FBI, 18 U.S.C. 1623, lying before the grand jury, and his lying at the trial of this petitioner.

When asked about any "deal," Mier denied that such a "deal" had been made to him. AUSA Pierson failed to correct this perjury, for it is clear that AUSA Pierson and

her superior, the U.S. Attorney for the Southern District of California, San Diego, had made a decision to not charge Manuel Mier for any crime at all, in turn for his known perjured testimony before the U.S. grand jury on April 4, 1996, and for his 1997 trial testimony leading to the convictions of this petitioner.

It is unconscionable to believe that the government would bring Mexican citizen Mier into the United States on two occasions, knowing him to be indictable for already committed crimes, and then eliciting perjury from him at petitioner's trial, and failing to disclose that the government had already decided that they were not going to arrest him, charge him, indict him, or bring him to trial for any of these crimes.

While the Assistant U.S. Attorney knew the truth, she failed to disclose these facts to the trial jury, allowed Mier to deny any "deal" had been made to him, and thus violated the general tenets of *Giglio v. United States,* 405 U.S. 150, 154 (1972) and *DeMarco v. United States,* 415 U.S. 449 (1974). A new government ploy may readily be seen to surface here – the government does not overtly tell a prospective witness of his/her serious criminal violations, and thus, as here, leads an ignorant foreigner to not realize his extensive criminal behavior and potential charges and indictments, and thus need never give him an "overt" deal; but the lay jury is not made aware of this decision, and is thus falsely led to believe the key material government witness is telling the truth because he, himself, is admitting to some criminal behavior, in spite of, potentially awaiting to be charged with those crimes upon his conclusion of testimony.

In view of the clear-cut indication that the government had made a "deal" with Manuel Mier, even assuming that their decision was not formally conveyed to Mier (one would think that Mier should have at least received warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 before he was interrogated before the jury, confessing his criminal behavior, if the government had decided to prosecute him!!), the U.S. Ninth Circuit tersely held at page A-19, *C. Immunity Agreement:*

> "Cooper contends that the government improperly failed to disclose an immunity agreement with Mier. The government denies that it had an agreement with Mier. This court reviews de novo alleged violations of the government's obligation to disclose leniency agreements with prosecution witnesses. *United States v. Brady*, 67 F.3d 1421, 1428 (9th Cir. 1995); see *Giglio v. United States*, 405 U.S. 150, 154 (1972).
>
> *As the defense established at trial, Mier's credibility was shaky at best. He faced potential criminal prosecution in the United States, so it seems unlikely that he would return to testify only because he wanted to tell the truth.* This, however, is at most circumstantial evidence of an immunity agreement with Mier. A defendant must present more direct evidence of an agreement to justify reversal on this ground. See *United States v. Ramirez*, 608 F.2d 1261, 1266-67 (9th Cir. 1979)."

The only problem with this highly questionable "analysis" is that only two people knew and held the truth – Mier and Assistant U.S. Attorney Pierson, and one denied the agreement, the second remained mute; balancing this conspiracy of silence is the fact that Mier "faced potential prosecution in the United States," and was never, never, never arrested, indicted, or tried, and in this month of August, 1999, some 6 years later, he has never

been so charged, a grateful United States embracing his perjury against petitioner with thanks and no criminal charges. Where, as here, the defense is not privy to the agreement, and it is suppressed, certiorari should be granted to provide nationwide guidelines that require disclosure of any inter-office U.S. Attorney agreement not to prosecute an obvious criminal called as a government witness, whether or not any overt agreement was conveyed to that perjuring witness or not.

A key and material re-examination and extension of *Giglio v. United States*, 405 U.S. 150, 154 is in order.

In this resolution of suppression of a "deal," the United States Court of Appeals has decided an important federal question in a way that conflicts with the general scope of *Giglio v. United States*, 405 U.S. 150, 154 (1972), as to call for this Court's supervisory power, within the meaning of *Mesarosh v. United States*, 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1 (1956).

Certiorari should be granted, as a significant and misapprehended distortion of the *Giglio-DeMarco* mandate is presented in this published opinion of the U.S. Ninth Circuit.

ARGUMENT IV

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE UNDER THE UNITED STATES SENTENCING GUIDELINES 2 F 1.1(b)(1)(K), AN ISSUE OF FIRST IMPRESSION THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT: WHETHER AN EFFORT TO COLLECT FOR SEWAGE SLUDGE LAWFULLY TRANSPORTED IN BEHALF OF A CITY AND LAWFULLY APPLIED TO LAND UNDER FEDERAL LAW 40 CFR 503 et seq. CAN BE TERMED AS AN INTENT TO DEFRAUD THAT SAME CITY OUT OF OVER $500,000 AND THUS CAUSE AN ELEVATION OF TEN POINTS IN THE U.S.S.G., AND A VERY ELEVATED FEDERAL PRISON SENTENCE?

While the United States Court of Appeals embraced many different and separate elevations in the ultimate sentence imposed on petitioner, one of these stands out – an elevation of 10 points for the "intent" to defraud the City out of over $500,000 in fees owed to petitioner's corporation, Chino Corona Farms, for the true removal of that amount of sewage sludge and the deposit of it on farmland of Imperial County, California in conformance with and pursuant to the federal statutes which took effect on February 19, 1993, 40 CFR 503, petitioner immediately being able to comply with that statute.

The law of the environment is, of course, of great interest today, and this petition raises issues which should elucidate key and newly enacted federal laws which effect all sewage disposal throughout the United States. Petitioner has addressed the failure of the lower federal courts to honor the Supremacy Clause in relegating 40 CFR 503 to a subservient position to a so-called "permit", where 40 CFR 503 specifically addresses that NPDES permit in excusing the notification section of the permit where, as here, the sewage sludge met the chemical, pathogen, and vector limits of 503.

Here the great and significant sentence imposed on this petitioner for a crime that he did not commit because of the superseding law is addressed, requiring an interpretation of section 2 F 1.1 (b)(1)(K) of the guidelines, an important question of federal law that has not been, but should be, settled by this Court. A panel of the Ninth Circuit, inter alia, has ruled that a federal defendant convicted of a crime involving fraud can be sentenced under the larger of what *actually* was taken vis-a-vis what was *intended* to be taken. See, e.g., *United States v. Shaw*, 3 F.3d 311 (9th Cir. 1993). At bar, clearly the City of San Diego was not defrauded out of anything, since they refused to pay petitioner's bills; the error stems from a claim that petitioner's effort to collect his lawfully earned money is somehow an "intent to defraud", and that he should, therefore, be elevated 10 points in the sentencing table.

This clear error requires a grant of Certiorari to interpret this section, and others, of the U.S.S.G. that affected the imposed sentence of 51 months.

CONCLUSION

For any one of the four key and de novo issues of this Petition, all raising important questions of federal law that has not been, but should be, settled by this court, Certiorari should be granted to the United States Court of Appeals for the Ninth Circuit.

Dated: August 20, 1999

Respectfully submitted,

ROGER S. HANSON
Counsel to Petitioner
Member of the Bar
United States
Supreme Court

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GORDON PAUL COOPER, *Defendant-Appellant.*	No. 97-50296 D.C. No. 96-0804-JNK OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted

May 8, 1998 – Pasadena, California

Filed April 9, 1999

Before: William C. Canby, Jr. and Andrew J. Kleinfeld, Circuit Judges, and Owen M. Panner, District Judge.*

Opinion by Judge Panner

COUNSEL

Roger S. Hanson, Santa Ana, California, for the defendant-appellant.

Melanie K. Pierson, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

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* The Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation

OPINION

PANNER, District Judge:

Gordon Paul Cooper appeals his convictions and sentence after a jury found him guilty of conspiracy, 18 U.S.C. § 371; aiding and abetting the unlawful disposal of sewage sludge, 33 U.S.C. §§ 1319(c)(2)(A) and 1342; and mail fraud, 18 U.S.C. § 1341. Cooper contends that he complied with federal regulations governing sewage sludge; that he cannot be criminally liable for violating a permit to which he was not a party; that the Clean Water Act is void for vagueness as applied; that the prosecution failed to disclose an exculpatory FBI report; that a government witness falsely testified that he had no agreement with the government; that the prosecutor committed misconduct during final argument; and that the district court improperly enhanced the sentence.

We affirm.

BACKGROUND

Cooper has been in the business of hauling sewage sludge for more than thirty years. In 1986, Cooper and Larry Vaughan incorporated Chino Corona Farms (CCF) in San Juan Capistrano, California. CCF transported, composted, and sold sewage sludge from several small cities.

Cooper was CCF's secretary-treasurer and Vaughan was its president. The district court described Cooper as

the "nuts-and-bolts guy" who knew the business of handling sewage sludge, while Vaughan was the "bookkeeper partner" who stayed in CCF's office handling the finances.

The City of San Diego (the City) was shipping its raw sewage to a treatment site on Fiesta Island, where the sewage was partially dried but not composted. The City processed its sewage under a National Pollutant Discharge Elimination System (NPDES) permit issued by the California Regional Water Quality Board, San Diego Region (the Water Board). The NPDES permit required that the City "give prior written notice . . . of any change(s) planned in the discharger's [i.e., the City's] sludge use or disposal practice." The NPDES permit also required that the City regularly report on its disposal of sewage sludge, describing the location, the rate of application in pounds per acre per year, and subsequent uses of the land.

In 1990, the City awarded CCF a contract to remove sewage sludge from Fiesta Island. CCF agreed to transport sewage sludge for about $20 per ton (later raised to about $24 at CCF's request) to Thermal, California, where CCF would compost the sludge. Because the City paid CCF by weight, the contract required that CCF submit weighmaster certificates (also called weigh or weight tickets) to verify the weight of sludge in each truckload. Weighmaster certificates are an official record of a truck's gross weight and the weight of its cargo. Valid weighmaster certificates are produced by a licensed scale and signed by the scale's operator. Cooper was convicted of mail fraud partly because CCF used false weighmaster certificates.

The contract required that CCF "obtain City approval to haul to the proposed site for which the required documentation has been submitted." CCF was required to submit bills of lading to show each truckload's ultimate destination. The contract did not refer to the City's NPDES permit.

CCF retained an attorney, James W. Anderson, who had experience on a Water Board, to determine whether CCF needed a permit to treat sewage sludge at its Thermal site. Anderson, who worked with Cooper, negotiated a memorandum of agreement with the governing Water Board. No permit was required. CCF voluntarily agreed to take precautions, such as building berms and drainage controls, to keep sewage sludge from entering surface or ground waters.

Soon after it began hauling for the City, CCF was overwhelmed by the volume of sewage sludge. CCF's site manager testified at trial that CCF received more sewage sludge each day at the Thermal site than it could compost in a month.

To prevent a further backlog of sewage sludge at the Thermal site, Cooper arranged to haul sludge directly from Fiesta Island to Mexicali, Mexico, without composting it at Thermal. In late spring 1992, after obtaining permission from authorities in Mexico, Cooper sought approval from the City and the Water Board. The City and Water Board accepted the Mexicali site because they decided they had no jurisdiction over it.

Cooper hired Manuel Mier, a citizen of Mexico, to supervise truckers hauling sludge from Fiesta Island to

Mexicali. CCF paid Mier $500 a week plus expenses. Mier reported only to Cooper.

When CCF first hired a trucking company to haul sludge from Fiesta Island to its Thermal site, CCF paid by weight and required weighmaster certificates. According to Mier, however, that changed when CCF began hauling sludge to Mexicali. Mier testified that Cooper told him not to have the trucks weighed. Instead, Cooper instructed him to create phony weighmaster certificates using blank forms Cooper supplied. Mier was to write in a fabricated cargo weight so that the gross weight of the truck would be no more than 80,000 pounds, which Mier understood to be the maximum allowed by California law. Mier (or others who helped him) wrote in Mier's name and signature as the deputy weighmaster. Mier then used the false weighmaster certificates to prepare invoices for billing the City.

Mier also testified that he mailed or personally delivered completed weighmaster certificates and invoices to Cooper. Cooper testified that he often received envelopes from Mier, but never looked at the weighmaster certificates inside them.

In spring 1993, after Mexican authorities detained trucks carrying sewage sludge for CCF, Cooper decided that he needed a different site for sludge disposal. Cooper knew that in February 1993, effective February 1994, the United States Environmental Protection Agency (EPA) had issued new regulations governing the land application of sewage sludge. 40 C.F.R. Part 503. The new regulations provided that if sewage sludge met standards for pathogens, trace minerals, and "vector attraction"

(i.e., attraction to rats or insects), the sludge could be applied directly to agricultural land as fertilizer with few restrictions. Cooper obtained an analysis of Fiesta Island sewage sludge, showing that the sludge met the new regulations' highest standards for sludge. Cooper concluded that the federal regulations authorized him to apply the sewage sludge directly to agricultural land.

For his new site, Cooper chose a farm owned by Jay Mason near Seeley, California, in Imperial County. Mason had purchased hundreds of tons of composted sludge from CCF's Thermal site. Cooper did not notify the City or the Water Board of his new site. Cooper testified that he did telephone the EPA's regional "sludge coordinator" about obtaining a permit for the Mason farm operation, and was told that no permit was required. There was no documentation or follow-up correspondence concerning Cooper's telephone call to the EPA.

The Planning Director for Imperial County, Urich Heuberger, testified that in spring 1993, CCF had asked about obtaining a conditional use permit for applying composted sewage sludge from CCF's Thermal site to certain agricultural land in the county. When Heuberger learned about the application of uncomposted sewage sludge at the Mason farm, he ordered CCF to stop applying sludge to county farm land without a permit.

By shipping sewage sludge directly from Fiesta Island to Mason's farm, CCF saved the expense of composting the sludge at the Thermal site, as well as the cost of shipping to and from Thermal. Cooper told Mason that rather than charge him for the sewage sludge, CCF would pay five dollars for each ton applied to his farm. Cooper

assured Mason that he had permits for the sludge and that it was harmless.

Cooper arranged for trucks to leave Fiesta Island in the late afternoon so they arrived at the Mason farm during twilight. The sludge was immediately worked into the soil. Cooper testified that CCF hauled sludge at night to avoid traffic and to prevent sunlight from dissipating nitrogen.

During the several weeks in March and April 1993 that CCF shipped Fiesta Island sewage sludge to the Mason farm, Mier submitted weighmaster certificates to CCF indicating that the sludge was still being shipped to Mexicali. Mier testified that he did so under orders from Cooper. CCF sent the false weighmaster certificates to the City to support its invoices.

The owners of the two trucking companies that hauled sewage sludge for CCF to the Mason farm testified that Cooper paid them by the truckload, not by weight. Cooper did not ask them to weigh the truckloads. A foreman for one of the trucking companies testified that Cooper refused his offer to weigh trucks.

In late April 1993, acting on a tip from Russell Rodvold, the owner of a trucking company, city employees followed a truck hauling sewage sludge for CCF from Fiesta Island to the farm in Imperial County. When the City's auditors discovered that CCF had lied about the sludge's destination, they examined CCF's invoices and realized that the weighmaster certificates were false. The City Auditor found that out of about 1,500 weighmaster certificates submitted by CCF listing truckloads sent to

Mexicali, about 425 truckloads, or 10,000 tons of sewage sludge, were dumped at the Mason farm.

When the City canceled its contract with CCF, Vaughan and others at CCF immediately blamed Cooper for the fiasco. A letter dated May 4, 1993, signed by Cooper and addressed to Vaughan, CCF's president, stated:

> Due to the problems with Contract # B1216/90 with the City of San Diego, problems which have arisen directly through my actions, I hereby tender my resignation as Director and officer of Chino-Corona Farms, Inc., a California corporation, efefective [sic] immediately.
>
> I acknowledge that the decisions I made with regard to the diversion of wet biosolids material from the City of San Diego directly to agricultural users in Imperial [C]ounty were my own and done without the knowledge of the other directors or officers of Chino-Corona Farms, Inc.

At trial, Cooper testified that he did not write the letter and that its statements were false. He said that he signed the letter only because Vaughan told him the City would pay CCF about $566,000 for outstanding invoices if Cooper resigned. The letter did not save CCF. When the City wouldn't pay CCF, CCF couldn't pay what it owed the trucking companies, and it was forced out of business.

The FBI investigated CCF. During a search of CCF's offices pursuant to a warrant, an FBI agent, Jennifer Esposito, showed Cooper a copy of the City's NPDES permit. Esposito testified at trial that Cooper thumbed

through the NPDES permit and appeared familiar with it, referring to it as a Water Board permit. Esposito testified that Cooper said "he was aware that Chino Corona Farms was required to report all sites where they dumped sludge taken from Fiesta Island to the Regional Water Quality Control Board and the City of San Diego."

When the case went to trial, Mier was one of the key witnesses against Cooper. On cross-examination, the defense established that Mier had told at least three conflicting stories about how and where he had obtained the blank weighmaster certificates used for the Mexicali operation. First, in an FBI report from March 1996, Mier said that Cooper went to a print shop in Mexicali by himself and later gave Mier a box of weighmaster certificates. Second, testifying before the grand jury in April 1996, Mier said that he went into a print shop in Mexicali with Cooper, translated for Cooper, and helped order the weighmaster certificates. Third, at trial, Mier testified that he went to a Mexicali print shop with Cooper and another person (either "Barilla" or "Padilla"), and that the three men arranged for printing the certificates.

Mier conceded that he had signed weighmaster certificates knowing that they were false. The defense also pointed out that Mier testified to the grand jury that he had estimated truckload weights without Cooper's knowledge on the assumption that Cooper would approve. The defense showed that CCF reimbursed Mier $5.00 for each truckload weighed, giving Mier an incentive to use false weighmaster certificates and pocket up to $200 a day. Mier admitted that during the Mason farm project, he had driven a truck himself, earning $300 per

truckload, even though as supervisor he should not have been driving.

The defense was missing a document that would have further impeached Mier: an FBI report stating that a Mexicali print shop, identified by Mier as having produced the weighmaster certificates, had no records or knowledge of the certificates. The defense did not learn about the FBI report until after the trial.

Cooper testified at trial. He denied telling Mier to make false entries in weighmaster certificates. Cooper testified that he never looked at the weighmaster certificates before they were sent to the City with invoices. He stated that anyone familiar with legitimate weighmaster certificates would have noticed obvious discrepancies in those submitted by Mier. For example, Mier's certificates gave weights in single pound increments, more accurately than any truck scale. They were also numbered in sequence, while certificates normally would have gaps in the sequence because of other trucks being weighed.

Cooper denied seeking permission to transport sewage sludge to Mexicali. Witnesses from the City and Water Board contradicted that testimony, and the prosecution produced a letter from the Water Board, dated June 1992, addressed personally to Cooper at CCF. The letter stated that it was "in response to your verbal [i.e., oral] request for approval to transport sewage sludge to Mexico." Cooper also denied talking to Heuberger, the planner for Imperial County.

Cooper denied telling Esposito, the FBI agent, that he was familiar with the City's NPDES permit. As the district court summarized Cooper's testimony, Cooper

blamed Mier and Vaughan for the false weighmaster certificates, while depicting himself as "just the dummy that they all danced around."

Besides Mier's testimony, the prosecution presented evidence and testimony that contradicted Cooper's testimony. Russell Rodvold, the trucking company owner who later tipped off the City that CCF was shipping sludge to the Mason farm, had hauled sludge for CCF to the Thermal site when CCF was paying by weight. Rodvold testified that when he complained to Cooper that it was taking too long to dump sludge, Cooper suggested that Rodvold drive his trucks over the scales more than once to generate false weighmaster certificates for additional payments. Rodvold refused, considering the practice fraudulent. At trial, Cooper admitted making the suggestion.

The manager for another trucking company testified that she was surprised to learn that CCF had used her business address as the address of the certified scale on weighmaster certificates. When she confronted Cooper, he told her that he was aware of it and that she should not worry. At trial, Cooper denied talking to the owner about the certificate.

The jury convicted Cooper on all five counts of the indictment. After a sentencing hearing, the district court adopted the presentence report's recommendations and sentenced Cooper to fifty-one months' imprisonment.

DISCUSSION

I. Preliminary Legal Issues

The district court denied Cooper's motion to dismiss the indictment. This court reviews the district court's rulings on legal issues de novo. *United States v. Lester*, 85 F.3d 1409, 1410 (9th Cir. 1996).

A. Federal Regulations Do Not Supersede the NPDES Permit

Cooper argues that he did not need approval from the City or the Water Board to apply sewage sludge directly to the Mason farm because federal regulations preempted or superseded the notice requirements of the City's NPDES permit. At trial, the district court allowed Cooper to testify that he had relied on the federal regulations, and to present expert testimony that the Fiesta Island sewage sludge met federal standards for direct land application.

We agree with the district court that Cooper erroneously assumes that the federal sewage sludge regulations relieved him of a duty to comply with the City's NPDES permit. By their own terms, the regulations do not usurp local control over the disposal of sewage sludge. *See* 40 C.F.R. § 503.5(b) ("Nothing in this part precludes a State or political subdivision thereof . . . from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or

disposal of sewage sludge."). The Clean Water Act preserves local control. *See* 33 U.S.C. § 1345(e) ("The determination of the manner of disposal or use of sludge is a local determination."). The regulations encourage direct land application of sewage sludge, but they do not require that states or local governments allow it. *See Welch v. Board of Supervisors*, 888 F.Supp. 753, 758 (W.D. Va. 1995) (EPA's "mere preference [for land application] is vastly different from legislation forcing states and localities to permit land application"). The district court properly concluded that the federal regulations do not supersede the NPDES permit.

B. Non-Permittees May Be Liable for Violating a Permit

Cooper argues that he cannot be liable for violating the City's NPDES permit because he was not a party to the permit. He contends that the government has criminalized conduct that at worst was a breach of CCF's contract with the City.

The Clean Water Act imposes criminal liability on "[a]ny person who knowingly violates . . . any permit condition or limitation implementing any of such sections [of the Act] in a permit issued under section 1342 of this title." 33 U.S.C. § 1319(c)(2)(A). For Cooper to be criminally liable, there first must be a valid NPDES permit. The government presented evidence that the Water Board, acting under authority delegated by the EPA, properly issued the City's NPDES permit. *See* 33 U.S.C. § 1342(b) (state or regional agency may administer NPDES permits if state or regional regulatory scheme

meets federal criteria); *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138-39 (9th Cir. 1998) (describing statutory authority for Water Board).

The statute imposes criminal liability on "*[a]ny person* who knowingly violates" a permit condition. 33 U.S.C. § 1319(c)(2) (emphasis added). The phrase "any person" is broad enough to cover permittees and non-permittees alike. *See United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991); *United States v. Iverson*, 162 F.3d 1015, 1025 (9th Cir. 1998) ("person" includes "any responsible corporate officer," 33 U.S.C. § 1319(c)(6), which includes a person who "has authority to exercise control over the corporation's activity that is causing the discharges").

The government also had to establish beyond a reasonable doubt that Cooper knowingly violated a condition of the NPDES permit. We need not resolve whether our law requires the government to prove that Cooper, who was not the permittee, knew of the permit and its requirements. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1284 n.5 (9th Cir. 1994) (as amended). Here, the district court held the government to the higher standard, instructing the jury that Cooper "must know his conduct violates the City's permit."

Under this higher standard, there was ample evidence of Cooper's knowledge of the NPDES permit and its application to his conduct. Municipal sources of sewage sludge must operate under NPDES permits. Cooper, who had transported sewage sludge for thirty years and considered himself an expert on the subject, could hardly

be ignorant of NPDES permits. *Cf. United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (persons dealing with "obnoxious waste materials" "must be presumed" to be aware of applicable regulations). Cooper obtained legal advice to determine whether a permit was required when CCF was composting Fiesta Island sewage sludge at its Thermal site. Cooper sought approval from the City and the Water Board when he wanted to transport sludge to Mexicali, evidence that he knew about the NPDES permit and its application to him. An FBI agent testified that when she showed Cooper the City's NPDES permit, he thumbed through it and said he knew what it was. The evidence was sufficient to establish that Cooper knowingly caused a violation of the City's NPDES permit, making him criminally liable under § 1319(c)(2).

C. The Clean Water Act Provisions Are Not Vague as Applied

Cooper argues that 33 U.S.C. §§ 1319 and 1342 are void for vagueness as applied because the statutes do not distinguish between different grades of sewage sludge, which range from raw sewage to the more processed sewage sludge at issue here.

This court reviews de novo whether a law is void for vagueness. *United States v. Hockings*, 129 F.3d 1069, 1070 (9th Cir. 1997). "A criminal statute is not vague if a 'reasonable person of ordinary intelligence' would understand what conduct the statute prohibits." *Iverson*, 162 F.3d at 1021 (quoting *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493 (9th Cir. 1996)). "[W]here, as

here, a criminal statute regulates economic activity, it generally 'is subject to a less strict vagueness test, because its subject matter is more often narrow and because businesses can be expected to consult relevant legislation in advance of action.' " *Id.* (quoting *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989)). "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The Clean Water Act defines "sewage sludge" as a "pollutant." 33 U.S.C. § 1362(6). A reasonable person who read the statutory definition and the City's NPDES permit would not conclude that the federal regulations encouraging land application of sewage sludge create an ambiguity in the statutory definition. The district court correctly concluded that § 1319(c)(2)(A) was not void for vagueness as applied.

Cooper argues that CCF's contract with the City requires that CCF comply with later enacted federal regulations. This argument is meritless. Cooper's actions did not comply with the new regulations because the new regulations did not supersede the City's NPDES permit requirements.

II. Use of Manuel Mier as a Witness

Cooper contends that the government's use of Mier as a witness requires reversal because (1) the government failed to turn over an exculpatory FBI report concerning Mier, violating its obligation under *Brady v. Maryland*, 373

U.S. 83 (1963); (2) the government allowed Mier to commit perjury; and (3) the government failed to disclose an immunity agreement with Mier.

A. FBI Report

Cooper claims that the government violated his rights under *Brady* by concealing an exculpatory FBI report. The government contends that the FBI report was available before trial for defense review, and that the report was not material.

To prevail on his *Brady* claim, Cooper must show that "(1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced; and (3) the suppressed evidence was material to his guilt or punishment." *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997) (citing *United States v. Steinberg*, 99 F.3d 1486, 1489 (9th Cir. 1996)). Evidence is material under *Brady* only if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed to the defense. *United States v. Service Deli, Inc.*, 151 F.3d 938, 943 (9th Cir. 1998). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Here, the FBI report stated that an investigation of the Mexicali print shop identified by Mier as the source of weighmaster certificates revealed no evidence that the print shop had ever printed for Cooper, Mier, or CCF. The

report would have impeached Mier, a government witness, so the first part of the *Brady* test is met. *Service Deli*, 151 F.3d at 943.

The parties dispute whether the government properly disclosed the report. The district court was not able to resolve the factual dispute.

Remand for an evidentiary hearing on disclosure is unnecessary, however, because the FBI report was not material. The defense was able to impeach Mier extensively. The defense established both through cross-examining Mier and through direct examination of Strange that Mier gave conflicting versions of events to FBI agents, to the grand jury, and at trial. The defense showed that Mier had an economic motive for falsifying the weighmaster certificates. The defense was also able to argue that Mier was lying when he denied the existence of an agreement with the government. One additional item of impeachment, showing that Mier lied about the source of blank weighmaster certificates, could not damage Mier's credibility much more than it already had been.

There was ample evidence of Cooper's guilt even without Mier's testimony. Given the already extensive impeachment of Mier and the independent evidence of Cooper's guilt, we conclude that the FBI report does not "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. The government's case did not rise or fall on Mier's credibility.

B. Perjured Testimony

"If a prosecutor knowingly uses perjured testimony or knowingly fails to disclose that testimony is false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict." *Ortiz v. Stewart*, 149 F.3d 923, 936 (9th Cir. 1998). Because Cooper did not argue at trial that the government presented perjured testimony, this court may review only if there was plain error affecting substantial rights. *People of Territory of Guam v. Veloria*, 136 F.3d 648, 652 (9th Cir. 1998). If those conditions are met, the appellate court may exercise its discretion to review an error "only if . . . the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citing *Johnson v. United States*, 520 U.S. 461, 467 (1997)).

Here, even if we assume that Mier committed perjury and the government knew of it, the prejudice to Cooper was not great. Cooper's attorney was able to impeach Mier extensively with inconsistent statements. There was no plain error.

C. Immunity Agreement

Cooper contends that the government improperly failed to disclose an immunity agreement with Mier. The government denies that it had an agreement with Mier.

This court reviews de novo alleged violations of the government's obligation to disclose leniency agreements with prosecution witnesses. *United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995); *see Giglio v. United States*, 405 U.S. 150, 154 (1972).

As the defense established at trial, Mier's credibility was shaky at best. He faced potential criminal prosecution in the United States, so it seems unlikely that he would return to testify only because he wanted to tell the truth. This, however, is at most circumstantial evidence of an immunity agreement with Mier. A defendant must present more direct evidence of an agreement to justify reversal on this ground. *See United States v. Ramirez*, 608 F.2d 1261, 1266-67 (9th Cir. 1979).

III. Prosecutorial Misconduct

Cooper contends that the prosecutor twice committed misconduct during closing argument. This court reviews claims of prosecutorial misconduct for plain error when the defendant did not object at trial, and for abuse of discretion when the district court denied an objection to closing argument. *United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997), *amended in part on other grounds*, 140 F.3d 1274 (9th Cir.), *cert. denied*, 119 S.Ct. 515 (1998). Cooper must show that it is " 'more probable than not that the misconduct materially affected the verdict.' " *United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998) (quoting *United States v. Hinton*, 31 F.3d 817, 824 (9th Cir. 1994)).

In the first incident, the prosecutor stated during closing:

> What else did [Cooper] admit to you? Well, he admitted that he knew that those invoices and weight tickets contained false statements.
>
> (Pause)

> He also admitted that he let known false statements be sent to the City of San Diego.

Defense counsel objected, contending that the prosecutor had misstated the evidence. The district court responded that the jury would make its own evaluation of the evidence.

When the prosecutor resumed her argument, she explained that the "false statements . . . sent to the City" referred to Cooper's letter of resignation, which Cooper had admitted contained false statements. Cooper argues that he was prejudiced because the mail fraud counts were not based on the letter of resignation. The indictment, the evidence at trial, and final argument on the mail fraud counts all focused on the false weighmaster certificates, so the jury could not have been confused by this reference to the resignation letter. *See Hinton*, 31 F.3d at 824 ("The prosecution's alleged misconduct must be viewed in the context of the entire trial.").

The prosecutor's reference to Cooper's testimony on the weighmaster certificates is more troublesome. The prosecutor arguably implied that Cooper admitted knowing the weighmaster certificates were falsified *before* CCF mailed them to the City. The jury should not have been misled, however, because it heard Cooper testify emphatically that he never looked at the certificates before they were mailed, and that he did not learn the certificates were false until after the City questioned their validity. Any remaining prejudice was eliminated by the court's instruction.

Cooper also contends that the prosecutor committed misconduct when she argued that if a hypothetical "eco-terrorist" who ruptured a sewage pipe flowing into the ocean would be responsible for causing a violation of an NPDES permit, then Cooper should be responsible for causing a violation the City's permit by depositing sewage sludge on an unauthorized site. Defense counsel did not object.

Considered in context, the prosecutor's analogy was not out of line. She was attempting to refute Cooper's argument that a non-permittee may not be criminally liable for causing a violation of a permit. To the extent that the term "ecoterrorist" could be prejudicial, the prejudice was not so egregious as to seriously affect the fairness or integrity of the trial. *See United States v. Rewald*, 889 F.2d 836, 862 (9th Cir. 1989) (prosecutor's reference to defendant as a nine-headed monster not misconduct), *amended in part on other grounds*, 902 F.2d 18 (9th Cir. 1990).

IV. Sentencing Issues

This court reviews the district court's findings of fact at sentencing for clear error. *United States v. Shannon*, 137 F.3d 1112, 1119 (9th Cir.) (per curiam), *cert. denied*, 118 S.Ct. 2390 (1998). The court's application of the law to the facts is reviewed for abuse of discretion. *United States v. Barnes*, 125 F.3d 1287, 1290 (9th Cir. 1997). This court reviews the district court's interpretations of the Sentencing Guidelines de novo. *United States v. Blitz*, 151 F.3d 1002, 1009 (9th Cir.), *cert. denied sub nom. Marie v. United States*, 119 S.Ct. 567 (1998).

A. Obstruction of Justice

The district court found that Cooper had willfully testified falsely on material facts, justifying a two-level enhancement for obstruction of justice. U.S.S.G. § 3C1.1 (citations are to the Nov. 1995 edition). At sentencing, the court stated that Cooper's testimony "didn't make any sense – not only was he not convincing on it, but it didn't make any sense that it was all Vaughan and all Mier, and he didn't do anything, didn't know anything. . . . And then when you look in the right context, of all of those denials that he made, . . . it was clearly testimony on very material facts that was not . . . credible, was not accurate, was not truthful."

The district court may enhance a sentence for obstruction of justice if the defendant's testimony was false, material, and willful. *Shannon*, 137 F.3d at 1119 (citing *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)). "Mere dispute or disagreement as to a defendant's perception of facts, without more, should not give rise to a charge of perjury in the context of sentencing." *Id.* at 1119 n.3.

The district court saw Cooper testify and supported the obstruction of justice enhancement with the proper findings of fact. The record supports those findings. The two-level upward enhancement for obstruction of justice was not error.

B. Discharge of a Pollutant

The district court ruled that because the Clean Water Act defines sewage sludge as a "pollutant," 33 U.S.C.

§ 1362(6), Cooper should receive a six-level enhancement for discharging a pollutant. *See* U.S.S.G. § 2Q1.3(b)(1)(A) (enhancement for "ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment"). Cooper contends that the enhancement doesn't apply because the sewage sludge met the federal regulatory requirements for land application.

The district court was correct that the statutory definition of "pollutant" controls. The federal regulations on land application did not implicitly amend the statutory definition. *Cf. United States v. West Indies Transp., Inc.*, 127 F.3d 299, 315 (3d Cir. 1997) (rejecting contention that raw sewage was not a pollutant because it was fully biodegradable), *cert. denied*, 118 S.Ct. 700 (1998). Under Cooper's direction, CCF dumped about 10,000 tons of uncomposted sewage sludge on the Mason farm. That dumping was "actual environmental contamination" as required by the guidelines. *See* U.S.S.G. § 2Q1.3 appl. n. 4; *United States v. Ferrin*, 994 F.2d 658, 664 (9th Cir. 1993) (interpreting identically worded application note 5 to U.S.S.G. § 2Q1.2 and holding that "a finding that the hazardous waste came into contact with land . . . is the appropriate predicate for an enhancement"). The enhancement requires "actual environmental contamination," not actual environmental harm. *See Ferrin*, 994 F.2d at 664 (defining "contaminate" as " 'to soil, stain, or infect by contact or association' or 'to make . . . impure by admixture' ") (quoting *Webster's New Collegiate Dictionary* 245 (1977)); *United States v. Bogas*, 920 F.2d 363, 368 (6th Cir. 1990) (concluding that enhancement under U.S.S.G. § 2Q1.2 applied even though "[t]here may have been no actual harm"). *Cf. Welch v. Board of Supervisors*, 888

F.Supp. 753, 756 (W.D. Va. 1995) ("the regulations also make clear that land application of sewage sludge still carries with it some risks; it is, after all, a pollutant."). The background note to U.S.S.G. § 2Q1.3 explains that it "parallels § 2Q1.2 but applies to substances which are not pesticides and are not designated as hazardous or toxic." Thus the guideline applied here is for nonhazardous pollutants, and the parallel guideline is for designated hazardous pollutants. A substance therefore can be classified as a pollutant even though it is not designated as hazardous. That this sludge may have been class A, nonhazardous and permissible under appropriate conditions for application to farmland, does not avoid application of the guideline for nonhazardous pollutants.

C. Permit Violation

The district court applied a four-level enhancement for "a discharge . . . in violation of a permit." U.S.S.G. § 2Q1.3(b)(4). Cooper contends that the enhancement should not apply because he was not required to secure a permit. This court rejected a similar argument in *Ferrin*, 994 F.2d at 664-65. Here, as in *Ferrin*, Cooper was convicted of a crime whose elements include violating a condition of a permit.

D. Amount of Loss

The presentence report calculated the intended loss caused by Cooper's conduct as $566,000, based on the amount of money CCF billed the City for shipments of sewage sludge to the Mason farm. The district court, which adopted both the presentence report's calculation

of loss and an alternative calculation suggested by the prosecutor, imposed a ten-level enhancement for a loss of more than $500,000. U.S.S.G. § 2F1.1(b)(1)(K).

The Sentencing Guidelines define loss as "the value of money, property, or services unlawfully taken." U.S.S.G. § 2F1.1, appl. n.7. "[T]he loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1, appl. n. 8; *United States v. Watson*, 118 F.3d 1315, 1319 (9th Cir. 1997). "[I]ntended loss is a proper measure to use in fraud cases." *Blitz*, 151 F.3d at 1009.

Cooper contends that CCF, not the City, lost money. He argues that because CCF did haul sludge from Fiesta Island, the City benefited from CCF's services. *See Blitz*, 151 F.3d at 1012 (because a defendant's services may have some value although part of a fraudulent scheme, the district court when calculating intended loss "should give credit for any legitimate services rendered to the victims").

The district court reasoned, however, that "removal is not the sine qua non of whether [Cooper] should be paid" because CCF was required to compost the sludge, and was not authorized to dump sludge wherever it pleased. The district court stated, "There has to be a procedure [for hauling sewage sludge] that complies with the law. And that's why [Cooper] gets paid a lot of huge dollars to remove this stuff." (An auditor testified that the City paid CCF about $8 million over the two-plus years of the contract.)

In *United States v. Frank*, 156 F.3d 332, 335-36 (2d Cir. 1998), *cert. denied*, 1999 WL 86965 (U.S. Mar. 22, 1999) (No. 98-1329), the Second Circuit dealt with a similar issue. There, the defendants agreed to ship sewage sludge by barge and dump it at sea 106 miles from shore. Instead, the defendants dumped the sludge well short of the required distance, and sent falsified invoices. The defendants were convicted of mail fraud.

On appeal, the defendants argued that the evidence was insufficient because "the municipalities got precisely what they bargained for – sludge disposal – and that, accordingly, the [defendants] neither intended nor caused the municipalities any harm." *Id.* at 335. The Second Circuit rejected this argument, reasoning that the defrauded municipalities paid defendants a premium for the full 106-mile transport, and that the defendants' "short-dumping" could have subjected the municipalities to fines and the loss of permits.

Here, CCF's removal of sludge from Fiesta Island had some value to the City, but that value was offset by the harm caused by CCF's failure to compost and legally dispose of the sludge. CCF's actions exposed the City to potential clean-up liability and to the loss of its NPDES permit. *See* 33 U.S.C. §§ 1319, 1342(b)(7) (permit holder subject to enforcement action for failure to comply with conditions of permit). These costs, while almost impossible to quantify, cannot be dismissed as phantoms. The district court noted that the City

> should be able to control where [the sewage sludge is] going to go – so [the City doesn't] get stuck with that legal mess – the time, the energy, the legal fees, and the bad publicity . . . – can

> you imagine how the people of Imperial [County] would feel if they are told that the City is illegally dumping its sewage waste on their farmland? All sorts of political problems.

The district court faced a daunting task in attempting to calculate the amount of the City's loss. Using the invoiced amount for the shipments of sludge to the Mason farm was in this case a reasonable, if rough, estimate of the intended loss. We cannot say that the district court's calculation was clearly erroneous.

E. More Than Minimal Planning

The district court applied a two-level enhancement for more than minimal planning. U.S.S.G. § 2F1.1(b)(2)(A). At sentencing, the court stated, "this was an ongoing scheme to submit false weighmaster certificates to the City. It was extensive. It was sophisticated."

" 'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. § 1B1.1, appl. n.(f). The district court did not clearly err in applying the enhancement.

F. Role in the Offense

The district court applied a two-level enhancement because of Cooper's role in the offense as a leader, manager, or supervisor. U.S.S.G. § 3B1.1. The court found that Cooper owned half of CCF, would have benefited more than others from the offense, knew about the CCF's day-to-day activities, and located a farmer to accept sludge.

When a defendant supervises other participants, he need exercise authority over only one of the other participants to merit the adjustment. *United States v. Camper*, 66 F.3d 229, 231 (9th Cir. 1995) (citing *United States v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993)). Here, the evidence supported the district court's finding that Cooper supervised at least one other participant. *Cf. United States v. Lopez-Sandoval*, 146 F.3d 712, 717 (9th Cir. 1998). The court did not err in applying the enhancement.

AFFIRMED.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GORDON PAUL COOPER, Defendant-Appellant.	No. 97-50296 D.C. No. CR-96-00804-JNK ORDER (Filed May 28, 1999)

Before: CANBY and KLEINFELD, Circuit Judges, and PANNER[1], District Judge.

The panel has voted to deny the petition for rehearing. Judge Kleinfeld has voted to reject the suggestion for rehearing en banc, and Judges Canby and Panner have so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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[1] The Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX "C"

CODE OF FEDERAL REGULATIONS

Protection of Environment

40

PARTS 425 TO 699
Revised as of July 1, 1995

[LOGO]

Relevant 40 C.F.R. 503 Law, Direct Application of Sewage Sludge to Land

PART 503 – STANDARDS FOR THE USE OR DISPOSAL OF SEWAGE SLUDGE

Source: 58 FR 9387, Feb. 19, 1993, unless otherwise noted.

Subpart A – General Provisions

§ 503.1 Purpose and applicability.

(a) *Purpose.* (1) This part establishes standards, which consist of general requirements, pollutant limits, management practices, and operational standards, for the final use or disposal of sewage sludge generated during the treatment of domestic sewage in a treatment works. Standards are included in this part for sewage sludge applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator. Also included in this part are pathogen and alternative vector attraction reduction requirements for sewage sludge applied to the land or placed on a surface disposal site.

. . . .

(b) *Applicability.* (1) This part applies to any person who prepares sewage sludge, applies sewage sludge to the land, or fires sewage sludge in a sewage sludge incinerator and to the owner/operator of a surface disposal site.

(2) This part applies to sewage sludge applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator.

. . . .

§ 503.2 Compliance period.

(a) Compliance with the standards in this part shall be achieved as expeditiously as practicable, but in no case later than February 19, 1994. When compliance with the standards requires construction of new pollution control facilities, compliance with the standards shall be achieved as expeditiously as practicable, but in no case later than February 19, 1995.

(b) The requirements for frequency of monitoring, recordkeeping, and reporting in this part for total hydrocarbons in the exit gas from sewage sludge incinerator are effective February 19, 1994, or, if compliance with the operational standard for total hydrocarbons in this part requires the construction of new pollution control facilities, February 19, 1995.

(c) All other requirements for frequency of monitoring, recordkeeping, and reporting in this part are effective on July 20, 1993.

§ 503.3

(b) Direct enforceability. No person shall use or dispose of sewage sludge through any practice for which requirements are established in this part except in accordance with such requirements.

. . . .

§ 503.5 Additional or more stringent requirements.

(a) On a case-by-case basis, the permitting authority may impose requirements for the use or disposal of sewage sludge in addition to or more stringent than the requirements in this part when necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge.

. . . .

§ 503.8 Sampling and analysis.

(a) *Sampling. Representative samples of sewage sludge that is applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator shall be collected and analyzed.*

. . . .

Subpart B – Land Application

§ 503.10 Applicability.

(a) This subpart applies to any person who prepares sewage sludge that is applied to the land, to any person who applies sewage sludge to the land, to sewage sludge applied to the land, and to the land on which sewage sludge is applied.

(b)(1) Bulk sewage sludge. The general requirements in § 503.12 and the management practices in § 503.14 do not apply when bulk sewage sludge is applied to the land if the bulk

sewage sludge meets the pollutant concentrations in § 503.13(b)(3), the Class A pathogen requirements in § 503.32(a), and one of the vector attraction reduction requirements in § 503.33 (b)(1) through (b)(8).

. . . .

(c)(1) *The general requirements in § 503.12 and the management practices in § 503.14 do not apply when a bulk material derived from sewage sludge is applied to the land if the derived bulk material meets the pollutant concentrations in § 503.13(b)(3), the Class A pathogen requirements in § 503.32(a), and one of the vector attraction reduction requirements in § 503.33 (b)(1) through (b)(8).*

. . . .

§ 503.12 General requirements.

(a) *No person shall apply sewage sludge to the land except in accordance with the requirements in this subpart.*

. . . .

(j) Any person who applies bulk sewage sludge subject to the cumulative pollutant loading rates in § 503.13(b)(2) to the land shall provide written notice, prior to the initial application of bulk sewage sludge to a land application site by the applier, to the permitting authority for the State in which the bulk sewage sludge will be applied and the permitting authority shall retain and provide access to the notice. The notice shall include:

(1) *The location, by either street address or latitude and longitude, of the land application site.*

(2) *The name, address, telephone number, and National Pollutant Discharge Elimination System permit number (if*

appropriate) of the person who will apply the bulk sewage sludge.

. . . .

§ 503.15 Operational standards – pathogens and vector attraction reduction.

(a) *Pathogens – sewage sludge.* (1) The Class A pathogen requirements in § 503.32(a) or the Class B pathogen requirements and site restrictions in § 503.32(b) shall be met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site.

APPENDIX D

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 5/9/96

VICTOR TORRES-MOLINA, Sales Manager, Impremex, S.A. Maderos 2088, Colonia Libertad, Mexicali, Baja California, telephone number 011-52-65-54-51-65, was interviewed at his business place by Liaison Officer (LO) ALFONSO M. VILLEGAS regarding any weighmaster certificates printed for MANUEL MIER or GORDON COOPER.

LO VILLEGAS was accompanied by two Mexicali Judicial State Police Agents, JOAQUIN RODRIGUEZ TORRES and JAVIER MARTINEZ NAVARRETE.

TORRES-MOLINA stated that he has worked for Impremex for the past fifteen (15) years and oversees all sales arrangements for the print shop. TORRES-MOLINA also identified his wife's brother in law, ENRIQUE A. ANAYA Q., as the owner of the business. TORRES-MOLINA added that ANAYA has been unavailable due to illness and has been away from the print shop since March 1, 1996.

TORRES-MOLINA stated that he did not recognize the names of MANUEL MIER, GORDON COOPER or CHINO CORONA FARMS.

TORRES-MOLINA acknowledged that they did some printing jobs in English, but not many. TORRES-MOLINA was given the opportunity to view copies of the documents labelled: Chino-Corona Farms, Inc. Invoice Number 0446; Calexico Scales Co, dated 04-11-93 and Calexico, California Quality Scales, 2686. After viewing the copies, TORRES-MOLINA said that those documents

had not been printed at Impremex. TORRES-MOLINA also advised that they did not mark the documents they printed in anyway.

TORRES-MOLINA also stated that they did not retain the master copy of any documented they print.

TORRES-MOLINA allowed agents VILLEGAS, RODRIGUEZ and MARTINEZ to view what available past printing invoices they had to determine if MIER or COOPER had ever placed a printing order. No invoices made out to the subjects were found.

Investigation on 4/25/96 at Mexicali, BC, Mexico

File # 249-SD-52258

by LO Alfonso M. Villegas/ld Date dictated 4/30/96

TORRES-MOLINA also advised that he had never heard of a print shop by the name of Emermex.

TORRES-MOLINA did not provide any other information and the interview was concluded.

TORRES-MOLINA was identified from the interview as follows:

Sex: Male

Race: White

DOB: 12/23/40

POB: Mexico

FEDERAL BUREAU OF INVESTIGATION

Date of Transcription 10/22/96

On October 19, 1996, MANUEL MIER, Hispanic male, date of birth 3/23/60, who resides at Calle Ezquivel Chavez #720, Mexicali, Baja California, Mexico, was advised of the identity of the interviewing Agent and the nature of the interview. He provided the following information:

MIER advised that since the last time he spoke with SA STRANGE he has not had any contact with GORDON COOPER or anyone associated with Chino Corona Farms. He further advised that he went to the print shop in Mexicali where he went with GORDON COOPER during the time he worked for Chino Corona Farms. He stated that the print shop is called LITO IMPREMEX S.A., located on Madereros 2088, Mexicali, Colonia Libertad. He provided SA STRANGE with a business card from Enrique A Anaya Q., a salesman from this business. He stated that he was positive that this was the same place he and COOPER bought the Quality Scales weighmaster certificates. He did not know where the Calexico Scales weighmaster certificates were printed. He did state that the only person he knew of who could have assisted COOPER in having the other set of weighmaster certificates made was HUMBERTO PADILLA. MIER stated that PADILLA and COOPER were associates during this operation and PADILLA would know where to get the certificates printed. MIER further advised that PADILLA is currently working for the Mexican Electoral Board, which

ensures legitimate elections and voting practices in Mexico. He doesn't have PADILLA's phone number, but occasionaly sees him and MIER will attempt to contact him soon and advise him to contact SA STRANGE as soon as possible.

MIER was given a trial subpoena requesting his presence at the trial United States vs. GORDON COOPER which is scheduled to begin on December 3, 1996. MIER promised to be present for this trial.

Investigation on 10/19/96 at El Centro, CA

File # 249-SD-52258

by SA David Strange Date dictated n/a

APPENDIX "E"

Purchasing Contract
Bid No. B1216/90

CONTRACT

THE CITY OF SAN DIEGO, a municipal corporation, hereinafter called "City", and

CHINO-CORONA FARMS, INC.

hereinafter called "Contractor", agree as follows:

Contractor shall furnish and deliver services in accordance with the specifications on file in the office of the Purchasing Agent of City, all of which are expressly referred to, incorporated by reference, adopted and made a part of this contract as though fully set forth herein, City's requirements for REMOVAL AND DISPOSAL OF AN ESTIMATED 120,000 TONS OF DIGESTED SLUDGE, as may be required for the period of one (1) year beginning August 1, 1990 through July 31, 1991, hereinafter called "services."

Contractor hereby agrees to comply with Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment Practices Act, *and any other applicable federal and state laws and regulations hereinafter enacted,* as well as those requirements addressed by the City of San Diego's Equal Opportunity Program, recorded with the City Clerk as Document RR-262633. Contractor understands that failure to comply with the above cited laws

and regulations and/or falsely submitting information required under same laws and regulations *may result in termination of this contract and debarment from awards of future City contracts for a period of not less than one (1) nor more than two (2) years.*

AMOUNT AWARDED: APPROXIMATELY 80,000 TONS

SEE PAGE 2a FOR PRICES.

SEE PAGE 3 FOR OPTIONS.

INSURANCE: See Page 8.

Terms: .05% 10 days

SEE ATTACHED PAGES FOR CONTRACT SPECIFICATIONS.

Contractor shall perform services as required per City's purchase order therefor. The date of performance is an essential condition of this contract and failure to perform within the agreed upon time shall be grounds for termination by City.

City shall pay for Services at the aforesaid prices within thirty (30) days following delivery thereof.

The failure of either party to insist upon strict performance of any term of this contract in one or more instances shall not be construed as a waiver of any such term, and the same shall remain in full force and effect.

Contractor shall not assign this contract, or any right or interest hereunder, without the prior consent in writing of City.

Dated July 12, 1990.

CHINO-CORONA FARMS, INC.
Contractor

By /s/ Larry Vaughn

Title President

THE CITY OF SAN DIEGO

By /s/ Ralph Shackelford
Purchasing Agent

I HEREBY APPROVE the form and legality of the foregoing Contract this 24th day of July 1990.

JOHN W. WITT, City Attorney

By /s/ M. Jackson
Deputy

(461 Tons/Day)
Alternate IV – Composting Option A

EST. QTY.	Cost Per Ten / Extension
120,000 tons	$18.53 / $2,223,600

(230 Tons/Day)
Option B

COST PER TON	EXTENSION
$20.78	$1,246,800

Disposal Site: (not specified in contract)

Type of Trucks to be used: 3 Axle Tractors Pulling 37' Semi-end Dump Trailers

Number of Trucks available: 10

Bidder's P.U.C. Permit Class and No.: 126605

SPECIFICATIONS

The City of San Diego requires the removal and ultimate disposal of approximately 120,000 tons of digested municipal sewage sludge as may be required for the period of May 1, 1990 through April 30, 1991. The sludge is currently stockpiled at the City of San Diego's Fiesta Island Sludge Drying Facility. The sludge has been certified "NON HAZARDOUS" by either the City of San Diego's Chemistry Laboratory, the County of San Diego's Health Services or both. The successful bidder, or bidders, will be responsible for the loading, hauling, application process and final disposal of the sludge product. Disposal options may include any, or all, of the processes referred to in the following alternatives:

Alternative I – *Direct Burial in an Approved Sanitary Landfill*

Alternative II – *Land Application*

Alternative III – *Chemical Fixation/Stabilization*

Alternative IV – *Composting*

Alternative V – *Incineration/Cogeneration*

Options II, III, and IV specifically exclude direct burial at a land fill of any type; however, disposal as "daily cover" or "final cover" in the reclamation of a landfill is an acceptable disposal option.

The City recognizes the beneficial nature of sludge and will encourage reuse, as much as possible, within cost and regulatory constraints.

It is possible, should other options become available, that no contract will be awarded at this time.

The City retains the right to cancel a contract should new sludge disposal regulations be adopted that cause a disposal option to become illegal or unworkable. There is a strong possibility that this may occur in the case of the land application and the composting alternative.

The successful bidder must coordinate his/her work so as not to interfere with or jeopardize the routine operation of the sludge drying facility or the operations of any other contractor operating at the facility.

The process proposed must be in accordance with any State of California Regulatory Agency or United States Environmental Protection Agency rules and regulations relating to said process. Bidder shall obtain written permission from the above named agencies, as well as any other regulatory agencies that may have jurisdiction, to use City of San Diego sludge as proposed. This written permission must be submitted with the bid. If written permission is not provided at the time of bid opening, bidder's proposal will be declared invalid.